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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 504.

APPALACHIAN COALS, INCORPORATED, *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF OF WALKER D. HINES, GOLDTHWAITE H. DORR AND WILSON COMPTON, AS *AMICI CURIAE* ON BEHALF OF THE COTTON TEXTILE INSTITUTE, INC., WINDOW GLASS MANUFACTURERS' ASSOCIATION AND NATIONAL LUMBER MANUFACTURERS ASSOCIATION.

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STATEMENT.

This brief is presented by those appearing as *amici curiae* because of their conviction that this case involves a legal phase of a pressing problem of our national industrial life. Experience during these hard years is emphasizing the questions raised by the breakdowns, temporary or chronic, in the sound functioning of certain industries even in such years as 1928 and 1929.

The characteristics of the coal industry, as portrayed by the findings and opinion of the Court below, are but illustrative of other situations. We have here the picture of an industry which developed an enormous over-capacity during the War. The immobility of the capital permanently fixed in the industry and the helplessness of a labor supply knowing only that occupation and living in communities remote from opportunity to shift into other industries, has perpetuated that over-capacity. Decreasing consumption due to more efficient use of coal and also to the switch to other fuels has intensified it.

Over a long period of years, the market has been chronically governed by an over-insistent pressure on the producer to sell. This enormous overhanging surplus capacity, shrinking consumption and the inherent necessity for shipping coal as mined and selling it promptly on arrival at market, drive the producer constantly to disregard costs and to dispose of his product at a sacrifice, for fear that even this disadvantageous opportunity may go elsewhere. Meanwhile, on the other hand, the buyer, confident of being able to fill his requirements whenever he needs to without active pressure of competition from his fellow-buyers in meeting their needs, can wait for probable opportunities to buy "distress" shipments, and can be sure that these conditions will secure him a favorable general market price which indeed may itself be artificially depressed by chronic "distress" sales and the deceptive effect of "pyramided" offers to sell.

This situation has produced a progressively deplorable condition. In its grip the producer and his employees, unless extraordinarily favored by the quality or working conditions of their coal seam, are as helpless to resist the

pressure as if the buyers were engaged in an unlawful monopolistic combination to depress prices. It is the picture of an industry where, over a long period of years, equality in bargaining between buyer and seller has disappeared. Resulting conditions to employer and employee have properly been a matter of public concern.

The vital question raised by such a situation—and it is not unique—is whether we can work out within the frame of the competitive system and the law, under present day industrial conditions, a technique of concerted action which, while not impairing the essential protection afforded by the competitive system to both buyers and sellers, will tend to prevent or lessen the injury done to one class or the other by the failures and inefficiencies of that system.

The case at bar presents one particular aspect of this wider problem which is specially important to the small and medium sized units of an industry. It is this: When the chronic condition or inherent characteristics of an industry are such as to play disastrously upon the individual weakness of such units in the competitive struggle, is the only resort of a group of such units a merger into a new large competitive unit, thus completely sacrificing their individuality? Or may they form an intermediate type of unit, competitive with other units in the industry, by a method of organization which will give them the same unified marketing operations as if merged, but which will enable them to preserve their initiative and individuality in their production and financing?

We are not primarily concerned with whether, as a result of its own examination of the facts and circumstances in this particular case, this Court shall affirm or reverse the decree of the Court below. But we are concerned, and

we feel that the industrial life of the nation, and in particular the small units of industry that desire to retain their individuality, are vitally concerned, with the approach to the problems of this particular case by this Court and the principles which it may lay down in reaching its decision.

We believe and will seek to develop in this brief that within the letter and spirit of the anti-trust laws there is a sound approach to such problems as are presented by this case which differs fundamentally from that expressed in its opinion by the Court below. It involves a consideration of the legal significance of certain characteristics of the competitive system itself which, while fundamental, do not appear to have been taken into account by the lower Court. This approach, we believe, effectuates to the full the purposes of the statute. At the same time it avoids certain restraints which the view taken by the Court below unjustifiably places in the way of the development and maintenance of a soundly functioning competitive system in industry—restraints which operate to perpetuate those very oppressive results which it is the objective of the law to prevent.

We submit to this Court the following propositions which seem to us to be fundamental in the approach to and determination of a particular case such as that at bar:

SUMMARY OF ARGUMENT.

The fundamental objective of the anti-trust laws is the maintenance of an effectively functioning competitive system in industry.

Not every form of concerted action among competitors designed to affect and affecting their action in competition with each other is unlawful *per se* as being necessarily

inconsistent with the maintenance of an effectively functioning competitive system.

In determining whether a given concerted action among a group of competitors is lawful, it is reasonable (1) to look to the protective characteristics of the effective functioning of the competitive system which it is the object of the statute to safeguard, and (2) to consider in the light of conditions in the particular industry whether such concerted action is destructive of the sound functioning of that system or consistent with or even promotive of it.

1. The prohibition against restraint of trade and monopoly is directed to securing the protective functioning of the competitive system for both buyer and seller alike.

2. It is essential to this protective functioning of the competitive system that there be both (1) active competition among buyers and (2) active competition among sellers. The system breaks down when a reasonable balance of this duality of active competition is lost or destroyed.

3. Extrinsic causes such as acute shortage or great over-capacity may operate as effectively in destroying this balanced duality of active competition as would artificial monopolization, either among buyers or among sellers.

4. A concerted effort among a group of competitors, whether buyers or sellers, to prevent or mitigate the oppressive effects of a breakdown in the protective functioning of the competitive system is the very opposite in character and result from concerted action to produce such a breakdown.

5. In the case at bar the Court below should have gauged the prospective effects of the creation of the

proposed new competitive unit in the light of the actual functioning of the competitive system in the industry in question. It should have taken into account the foregoing principles in determining whether such concerted action producing such effects is consistent or inconsistent with the provisions and objectives of the statute.

6. Concerted action among a group of competitors to create a new competitive unit by combining only their marketing function, while preserving their individual initiative in production, should certainly not be held *unlawful* in a case where concerted action among the same group of competitors to create a new competitive unit, which combines both their marketing and their producing functions through complete merger, would be held *lawful.*

There seems to be no controlling decision of this Court which stands in the way of the application of the principles for which we here contend.

The Court in applying this statute to changing conditions as they arise is in effect developing a branch of the common law.

ARGUMENT.

POINT I.

The fundamental objective of the anti-trust laws is the maintenance of an effectively functioning competitive system in industry.

We take it that there is general agreement that this is the underlying philosophy of the anti-trust laws.

POINT II.

Not every form of concerted action among competitors designed to affect and affecting their action in competition with each other is unlawful *per se* as being necessarily inconsistent with the maintenance of an effectively functioning competitive system.

It has been argued at times that any concerted action whatever by competitors is inconsistent with the competitive system and illegal *per se*. Concerted action among competitors to contribute intimate facts of their business to a common fund of information as to market conditions, the intelligent use of which naturally tends to affect the action of each as to production and prices, was attacked ten years ago as being inherently inconsistent with the competitive system and therefore illegal. This Court held, however, that such concerted action is not in itself illegal, but is instead promotive of a soundly working competitive system. *Maple Flooring Assn.* v. *United States,* 268 U. S. 563 (1925); *Cement Mfrs. Assn.* v. *United States,* 268 U. S. 588 (1925).

Further, the elimination of any particular competitive practice by concerted action among competitors was at one time also attacked as in itself inconsistent with the competitive system and therefore illegal. But the existence of an effective competitive system does not depend on the employment of every competitive practice. Many of the most effective competitive practices are actually prohibited by law as being unfair. Concerted action for the elimination of other competitive practices by groups of competitors has been taken in numerous industries with the cooperation

of the Federal Trade Commission, where such practices, although not positively illegal, are found by experience to be objectionable, unsound and unnecessary to an effective competitive system.[1]

Concerted action by competitors to cope with other particular situations in their industries have been before this Court. For example, in the case of *Chicago Board of Trade* v. *United States,* 246 U. S. 231 (1918), there was concerted action by all the members of the Chicago Board of Trade in regulating the prices at which purchases should be made during certain hours of the day. This Court, in gauging the effect of this restraint on competition, looked at the particular circumstances of the business and at the character and prospective effect of the restraint, and held that it was not inconsistent with the sound functioning of the competitive system in this business. In the case of *National Association of Window Glass Manufacturers, et al.* v. *United States,* 263 U. S. 403 (1923), competitors in the hand-blown section of the window glass industry had jointly adopted certain schedules of operation. In view of the particular competitive situation and the abnormal circumstances as to available labor supply in this industry, this Court held that the concerted action was not objectionable.

Again, the elimination of competition between two or more competitors by their combination into a single business unit was at one time confused with the elimination from an industry of an effectively functioning competitive system and regarded by the lower courts as illegal *per se.*

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[1] Commerce Clearing House, Federal Trade Regulation Service, "Official Reports of Trade Practice Conferences", Vol. II, 7th Ed., pp. 4079, *et seq.*

United States v. *American Tobacco Co.*, 164 Fed. 700 (C. C., S. D. N. Y., 1908). But such concerted action among competitors in effecting their combination is a matter of every day occurrence. The question of its legality is now recognized as turning on whether the effectively competitive character of the industry is thereby destroyed, and not on whether the competition between two or more particular competitors is eliminated. *United States* v. *Quaker Oats Co.*, 232 Fed. 499 (D. C., N. D. Ill., E. D., 1916); *United States* v. *Standard Oil Company of New Jersey, et al.* (Supplemental Petition), 47 F. (2d) 288 (D. C., E. D. Mo., 1931).

Further, it seems to be recognized even in the opinion below that to some extent two or more competitors may combine a particular function of their activities.

In all the foregoing situations, the question of the lawfulness of the concerted action seems to have been examined in the light of the conditions of the particular industry, and of the prospective effect of such action upon the functioning of the competitive system. The question seems to turn on whether such action is broadly consistent with the effective functioning of that system. We shall proceed to further develop the reasonableness of this principle.

POINT III.

In determining whether a given concerted action among a group of competitors is lawful, it is reasonable (1) to look to the protective characteristics of the effective functioning of the competitive system which it is the object of the statute to safeguard, and (2) to consider in the light of conditions in the particular industry whether such concerted action is destructive of the sound functioning of that system or consistent with or even promotive of it.

1. The prohibition against restraint of trade and monopoly is directed to securing the protective functioning of the competitive system for both buyer and seller alike.

In industry generally, the active play of competition among buyers on one side in securing their requirements and among sellers on the other in disposing of their product tends to result in a competitive price protective of the interests of buyers and sellers alike. The common law and this statute, then, to assure this protection which the competitive system would thus ordinarily automatically afford, seeks to protect the effective functioning of that system in industry by forbidding contracts in restraint of trade and monopolization. In other words, in industry generally, the law protects the effective functioning of an economic mechanism which, while so functioning, will afford the public *indirectly* much the same protection that in a highly monopolistic public service business is ordinarily secured *directly* by the regulatory action of legislature or commission.

The public which is to be protected by the operation of the statute consists of both buyers and sellers. The law ap-

plies just as much to an unreasonable restraint of trade by a combination of buyers as by a combination of sellers. *Swift & Co.* v. *United States,* 196 U. S. 375 (1905). That the law is as much concerned with the prevention of oppressive consequences to those on one side of the marketing process as on the other side of that process, is sometimes forgotten.

2. It is essential to this protective functioning of the competitive system that there be both (1) active competition among buyers and (2) active competition among sellers. The system breaks down when a reasonable balance of this duality of active competition is lost or destroyed.

What is the characteristic which distinguishes a competitive industry from a monopolized industry? It is not the presence of competition in the case of a competitive industry and its absence in a monopolized industry, for active competition is present in both cases. Let us illustrate. Where there is an effective monopolistic combination among the buyers, there is still active, indeed accentuated, competition among the sellers in disposing of their product; or in the reverse case of an effective monopolistic combination among the sellers, there remains active, and indeed accentuated, competition among the buyers in filling their requirements.

The essential distinction is that in a truly competitive system there is a duality of competition—active competition among buyers in filling their requirements and active competition among sellers in disposing of their products. If this duality of competition is destroyed by a monopolistic combination either among buyers or among sellers, then the competitive system, certainly so far as furnishing any protection to the public is concerned, is destroyed in that industry; for as has just been emphasized the public which

the competitive system is designed to protect is composed of sellers as much as buyers. To be sure there is competition remaining; but that competition is only among the members of one of the two classes and merely aggravates the injury which may be done to that class through the monopolistic power which has been created in the other. To illustrate, if there is a monopolistic combination of buyers, the competition among sellers in disposing of their products becomes panic selling and merely facilitates the exertion of the monopolistic power of the combination of buyers to force the price down to levels which bear no reasonable relation to cost of production. On the other hand, if there is a monopolistic combination of sellers, the competition among buyers in securing their requirements produces panic buying which again merely facilitates the exercise of power by a monopolistic combination of sellers, and the price skyrockets to a point only limited by the ability of the buyers to pay.

To constitute a truly competitive system in an industry, then, certainly in any sense in which the law can look upon such a system as a mechanism for the protection of buyers and sellers alike, there must be this duality of competition and a reasonable balance in the activity of *both* phases of that competition. By this we mean there must be active competition on one side among the buyers and on the other side among the sellers.

To prevent this breakdown of the competitive system by the destruction of this duality of competition the law prohibits any artificial monopolistic combination which eliminates effective competition among buyers or any artificial monopolistic combination which eliminates effective competition among sellers.

3. Extrinsic causes such as acute shortage or great over-capacity may operate as effectively in destroying this balanced duality of active competition as would artificial monopolization, either among buyers or among sellers.

This brings us to a second vitally important characteristic of the competitive system, which has a direct bearing on the effect upon such a system of concerted action among competitors. Factually, this characteristic is a commonplace, but its legal significance may easily be lost sight of. The functioning of the competitive system can be, and often is, broken down with precisely the same oppressive results by extrinsic causes other than artificial monopolistic combination. A great overplus or a marked shortage as compared with the accustomed needs of the community will be quite as devastating to the protective functioning of the competitive system, through the destruction of its characteristic duality of active competition, as a monopolistic combination would be.

An acute shortage will produce a panic competition among buyers to satisfy their requirements. In consequence, there will be a relaxation of activity in competition among sellers in disposing of their products, equivalent for practical purposes to the effect of an artificial monopolistic combination of the sellers; and there will be the same resultant skyrocketing of prices from a normal competitive price. Conversely, when a great overplus results from overproduction or from a sharp falling off of consumption, the practical results are the same. In this case there is an accentuation of competition among sellers in disposing of their product that becomes panic selling. In consequence there is substantially the same relaxation of activity in competition among buyers as would be produced

by a monopolistic combination among them. In fact, in such a situation the price is apt to be forced lower than it would be by a monopolistic combination of buyers. If the buyers are using the product purchased in competition among themselves, they are in such times of overplus apt to hold off to the limit, waiting for the price to drop further, so as not to be at a disadvantage with their competitors in their own costs of production.

In either case, there is a destruction of that reasonable balance of active competition both among buyers and among sellers which is necessary if the competitive system is to perform the same protective function in industry generally that is performed by the regulatory function of the law in a highly monopolistic public service business.

That these commonplaces of economic fact may have a legal significance we suggest is illustrated by the decisions of this Court in the *Rent Cases*.[1] This Court has repeatedly held that there is normally no power in the States to regulate prices in private industries, and has recognized that the renting of premises is normally a business that cannot be so regulated. The sound functioning of the competitive system furnishes protection to the lessor and lessee alike. But after the World War there was an acute shortage in the supply of housing. The acute competition among the lessees and the consequent practical disappearance of competition among the lessors raised prices to the point where they bore no reasonable relation to the normal competitive price. The effects could hardly have been more drastic if there had been an artificial combination by

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[1] *Block* v. *Hirsh*, 256 U. S. 135 (1921); *Marcus Brown Holding Company, Inc.* v. *Feldman, et al.*, 256 U. S. 170 (1921); *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242 (1922).

all those who had premises to let. The protective function of the competitive system in this business had disappeared and the oppressive conditions were those of monopoly. This Court held in the *Rent Cases* that in this emergency there was, for the time being, a power in the public to fix prices.

In so doing was not this Court giving a legal significance to the business fact that active competition on only one side is a radically different mechanism from active competition on both sides of the market? If, as these cases hold, the oppressive results flowing naturally from the destruction of the competitive balance warrant drastic governmental regulation which could not be imposed in a normally functioning competitive industry, would they not also have a bearing on the propriety of action by the class affected, whether buyers or sellers, to mitigate these oppressive effects by their own concerted efforts?

Such partial or complete breakdowns of the competitive system, under the complicated conditions of modern industry, are sometimes temporary and sometimes chronic. In the case of an industry where there is an increasing use of substitutes which have natural economic advantages, where improved methods of use of the product cut down the volume of demand for it, and where as a result there is a permanent over-capacity, there is apt to be a chronic breakdown of the competitive system. The natural processes by which such a condition is ordinarily remedied rarely move in such a situation with a speed even to gain on the progressive accentuation of its difficulties. Capital is fixed; it cannot take flight to some more favorable field. Instead, it merely changes hands repeatedly through receivership and bankruptcy. Labor often is, for practical purposes, fastened to

the trade and community to which it has been accustomed. It undergoes at times what seem unlimited degrees of privation where it has its roots down instead of forming the fluid stream of the classical economist. As a result, there are all the evils of panic selling. In this breakdown of duality of effective competition through chronic overplus or constant threat of overplus, the practical situation is substantially the same as if all buying power were combined in an artificial monopoly.

4. A concerted effort among a group of competitors, whether buyers or sellers, to prevent or mitigate the oppressive effects of a breakdown in the protective functioning of the competitive system is the very opposite in character and result from concerted action to produce such a breakdown.

Is there not in these characteristics of the functioning of the competitive system the key to certain problems which have perplexed industry and perhaps the courts? Looking at the realities of the situation, is not the problem of the law in dealing with concerted action of a group of competitors where the competitive system has gone out of balance, affected by the very fact that it *has* gone out of balance?

In such a situation, concerted efforts of a group of competitors to moderate the oppressive effects of the breakdown of the competitive system, by lessening their "distress" selling and increasing their efficiency in marketing, are the very antithesis in purpose and effect of efforts by a group to break down a normally functioning competitive system by the artificial monopolization of selling power or buying power. The former group seeks to correct or mitigate the very type of evil which the latter group seeks to create. One course is curative, the other is destructive.

Take the case of an acute shortage. In this situation, sellers, instead of actively competing in the disposal of their product, are, as we have pointed out, merely taking orders or waiting for the distress buying of the accentuated competition among the buyers to further skyrocket the price. The protection afforded by the competitive system to buyers is for the time being gone. They are for practical purposes at the mercy of a monopolistic price. Is the substitution of some measure of protection by concerted action of a group of buyers for the protection which the lost balance of the competitive system ordinarily affords inconsistent with or an attack on that system?

When extrinsic causes over which the individual has no control, through their stifling effect on one side of the competitive process, produce that very inequality in bargaining power that is the vice of monopoly, should not efforts at self-help in an industry to moderate the effects of this inequality be regarded as affirmatively in line with the objects of the statute? The courts can enjoin an artificial monopolization or grant a recovery in treble damages to those who suffer by it. But no court can enjoin the operation of a cyclical depression, nor can it enjoin the operation of the many other extrinsic causes which may have the same destructive effect on the equality in bargaining power as an artificial monopolization.

Why should a statute fundamentally designed to prevent such inequality and its results be held to forbid any practicable defensive and corrective measures against it? Is the argument tenable that the law is directed at inequality produced by artificial monopolization, but if the same evil results are produced by "natural" causes they are—like a flood—to be regarded as Acts of God, and may not be

legally resisted by the present or prospective victims in the industry working together in any measures of flood control or rescue? Such a philosophy seems to us to be traceable primarily to a certain misconception of fact, that breakdowns of the competitive system readily redress themselves. This is true enough of the ordinary workings of many industries. But it is to ignore the realities not to recognize that, in certain other industries and over long periods of time, extrinsic causes which are not self-redressing produce a chronic inactivity on one side of the competitive process and a resulting inequality in bargaining power comparable in effect to that of an artificial monopolization. Further, there are also acute situations which are self-redressing only at the expense of a vast amount of damage which might well be mitigated.

The sound approach would seem to be to recognize that concerted action by a group of competitors in an industry, whether buyers or sellers, to prevent or mitigate the breakdown of the protective functioning of the competitive system is the very opposite in legal significance, as it is also in its factual results, from concerted action to produce such a breakdown.

In the examination of any concerted action among competitors it would seem essential, then, to look at the way in which the competitive process is actually functioning in the particular industry. Otherwise no reasonable judgment can be formed as to whether the effect on that functioning is opposed to or in accord with the protective purposes of the statute. Does it merely mitigate the oppressive results of inequality and redress to some extent that inequality? Or does it create an oppressive inequality in their own favor?

With the approach we urge, it is possible to explore the practicability of building up a technique within the scheme of the competitive system for ameliorating the injurious consequences to the public from failures of that system to perform its function of affording protection to buyers and sellers alike. The more that extrinsic causes tend to keep those on one side of the competitive process at a chronic disadvantage, the more important is the development on that side of the compensating operation of business mechanisms to reduce that disadvantage. Such developments should be regarded as normal adaptations of the mechanics of an industry to the particular way in which the competitive process in that industry can function most wholesomely.

5. In the case at bar the Court below should have gauged the prospective effects of the creation of the proposed new competitive unit in the light of the actual functioning of the competitive system in the industry in question. It should have taken into account the foregoing principles in determining whether such concerted action producing such effects is consistent or inconsistent with the provisions and objectives of the statute.

While the law is designed to protect the competitive system, it is not designed to render industry helpless in seeking, by its own initiative and in the light of experience, to cure the diseases which grow up in the competitive system and to aid that system in continuing to function in a wholesome manner, provided the methods employed are employed for that purpose and are reasonably adapted to it. The processes of evolution referred to above in Point II are illustrative of this Court's solicitude to protect efforts of this character seeking to cope with such diseases and

thus promote healthful functioning of the competitive system.

As is characteristic of the complexities of our civilization at this date, diseases which impair the effective functioning of the competitive system are more numerous and difficult than ever before, and it is more important in the public interest than ever before to encourage curative efforts reasonably promotive of the object contemplated.

It is not our function, however, in this brief to attempt to catalogue what particular corrective measures of concerted action among a group of competitors are practicable or lawful under the widely varying circumstances in which the competitive balance in an industry is partially or wholly destroyed. The range of such measures is, of course, not unlimited from either aspect. What we are concerned with here is the application of the foregoing principles to the creation of a new competitive unit by a particular group of competitors through the unification of their marketing function.

There is nothing novel in this type of unit. Marketing through an exclusive selling agency is an old business mechanism. The court below concedes that there is nothing *per se* illegal in this type of mechanism, though necessarily in every case in the creation of a new unit there is an elimination of competition in marketing between its particular constituents.

We part company from the Court below on two grounds: First, the Court below has not attempted to gauge the prospective effect of the formation of this particular unit in the light of the actual functioning of the competitive system in the industry in question and of the foregoing principles; and, second, it has resorted to a wholly arbitrary

restriction in holding that, though a particular group of competitors may unite *all* its functions in a new competitive unit by a complete merging, it may not unite *only* its marketing function. This second point we will consider *infra*, page 28.

The Court below in its opinion points out clearly enough the long-continued deplorable conditions in the coal industry. It is, of course, correct in holding that these disastrous conditions do not constitute any grounds for dispensing with the application of the statute to an illegal concert of action. But may it not be that the *causes* of these oppressive results are failures in the functioning of the competitive system in this industry? If this proves to be the case, may it not have a bearing on whether the particular concerted action among this group of competitors is in fact lawful as being merely the normal development of a sound competitive mechanism appropriate to the conditions of this industry? To appraise the character and effect of such action with any accuracy, it must be examined in relation to the facts existing in the industry in question and particularly as to the actual functioning of the competitive system in that industry.

In the case at bar the coal industry, as described by the Court below, has all the indicia of one in which there is a chronic partial breakdown of the competitive system—decreasing demand, increasing competition from economical substitute products, resultant over-capacity, a vast number of small scattered producers remote from their markets, and an investment and labor supply which is not fluid. Furthermore, in the case of a coal mine, not only is capital tied up in plant and equipment, but it is tied up in the entire supply of raw material which the plant will convert into a marketable commodity during the whole life of the enter-

prise. And finally, coal is a product which, for marketing purposes, is as perishable as watermelons—both must be shipped immediately on production and must be sold immediately on arrival at their destination.

All these facts tend to make the market one which, as the Court below found, is chronically a buyer's market; one in which there is a constant tendency toward panic and distress selling on the part of the sellers and practically no pressure of competition among the buyers in filling their requirements. Prices, instead of being true competitive prices, resulting from a reasonably balanced activity of competition among the buyers on the one hand and sellers on the other, are in effect monopolistic prices. Indeed, from the Court's description of the industry and its findings of fact, they are the kind of prices which would be just about the extreme that could be imposed by a monopolistic combination of all the buyers—namely, prices barely high enough to enable the sellers to make the necessary cash operating outlay to keep the amount of product moving that buyers elect to purchase.

If these or anything approaching them are the facts as to the functioning of the competitive system in the coal industry, then it is highly important to look at the concerted action of this particular group of producers in the light of those facts in order to gauge the relation to, and effect on, the competitive system, of such action. What they have done, as we have said, is to set up a new competitive unit in marketing. In so doing have they done more than to make use of a business mechanism which will have a volume and diversity of business and strength that may enable it to avoid in the main such unjustifiable practices as "distress" selling below cost? Such practices are obvi-

ously the result of being the underdog in an industry. They are the outgrowth of causes partly inherent in the nature of the industry and partly extrinsic, which so relax activity of competition among buyers that the sellers are at chronic disadvantage. If that is all there is to it, why shouldn't the weaker side organize in competitive units of a character to permit it to lessen its disadvantages? If there is no known form of business organization adapted to the particular needs of an industry, why should it not invent one or, as here, develop the familiar selling agency mechanism in a way to serve the purpose? Have the buyers a prescriptive right to have the sellers organized in types of competitive units which under the condition of the industry are so ineffective that the buyers can secure their supply or much of it below cost?

Of course, if this Court should find from its own examination of the evidence that the prospective result of the creation of this new unit would be the exercise of a power to impose an arbitrary non-competitive price on the buyers, then the situation is reversed. This would not then be a strong competitive unit; it would be an illegal monopolistic combination in restraint of trade. But if the Court below be right in its view of the evidence, that is not the situation. This new unit, it is found, will not have the power to set a market price.

The Court below states that the formation of this new competitive unit by this particular group of producers may "affect" price but does not define the term. Evidently it cannot be used here to mean power to make an arbitrary price in the industry, if the Court's findings of fact are correct. It would seem to mean, in the light of these findings, merely that this particular competitive unit may be able to

lessen for its particular constituents "distress" selling, the "pyramiding" of offers of sale, and other practices which lead to sales below the generally prevailing market rate and which possibly have an artificial depressing effect on the prevailing market price. The creation of this unit might also enable its smaller and weaker constituents to share in important long-term contracts of large buyers and thus be less subject to the necessity of "distress" selling.

The Court below points out that the volume of the product which the new competitive unit will be trying to dispose of in the market will be substantial and will affect the market price. But the Court in no way indicates how it conceives that the offering of this volume competitively through a single channel will so affect the general market price. Under the proposed plan this volume is to be disposed of at the best obtainable price under existing competitive conditions; in other words, disposed of competitively. From the findings of fact, it is difficult to see how putting this volume through a single competitive channel could do more with regard to price than, as we have said, to lessen the deceptive effects of "pyramiding" orders and to lessen the amount of "distress" coal actually moving into the market by reason of the ability to distribute the available orders and parts of orders for various grades of coal with greater flexibility among a larger number of mining operations. If the prevailing market price is at present depressed from what it would otherwise be, by reason of the amount of such "distress" coal, and the deceptive effect of "pyramiding", the creation of the new unit might then afford some relief from this pressure.

On the other hand, the prevailing market price may be governed entirely by the basic competitive conditions in the

industry as a whole and by the limiting factor, not of intra-industry competition, but of inter-industry competition with fuel substitutes,—natural gas, oil and water power. It is common knowledge that what is now coming more and more to be offered for sale is "automatic heat". Oil, gas and hydro-electric power lend themselves particularly well to the economical automatic production of heat. It is difficult to see from anything in the detailed findings of fact how the flowing of this particular amount of coal into such a strongly competitive market through one funnel instead of through numerous channels is going to affect the general level in that market in one way or the other. Apart from avoiding "distress" sales and "pyramiding" orders, the benefit to the defendants from the new unit, it would appear, must flow from ultimate economies in marketing, from a better knowledge of market conditions and from the promotion of more effective competition with other coals and substitute fuels.

But assuming that the lessening of "distress" sales and the lessening of the deceptive effect on the market of the "pyramiding" of orders would somewhat relieve the pressure on the prevailing market price by these factors, why should not a group of persons engaged in an industry seek to operate through such a competitive unit, whether in the form of a single corporate entity or a single marketing unit, as will be of a character to "affect" in this way the prices they get for their products? To avoid having to sell at such unremunerative prices is a normal and legitimate business objective, and a type of competitive unit which will merely effect this for them—while being in a true sense a competitive unit and therefore without power to reverse the process by imposing an arbitrary price—is

certainly in accord with the objectives of the law. Would it not unreasonably restrain individual freedom in industry to forbid it?

Such "distress" selling and the deceptive effect in the market of "pyramiding", and any depressing effect they may have on market prices, are not the result of the functioning of a reasonably balanced two-sided competition which is the essence of the competitive system. They are rather the aberrations produced by the breakdown, chronic, temporary or partial, of the protective functioning of that system in an industry, due to the operation of extrinsic causes which have substantially the same effect as an artificial monopolistic combination of the buyers would have. It is no more the purpose of the statute to preserve a breakdown of the system to enable a buyer to buy his product at the lowest possible distress prices than it is to preserve a breakdown in the system to enable a seller to sell his product at the highest possible panic prices.

If the findings of fact by the Court below correctly reflect the evidence, it is fair to say that after the new unit is in operation the prevailing market price of coal will continue to be the resultant of: (a) Competition among numerous sellers, of which this unit is one, most of them offering coal, and others offering efficient substitutes such as petroleum products and hydro-electric products—a competition which is and must necessarily remain extremely acute by reason of the over-capacity of the industry; and (b) competition among buyers in securing their requirements—a competition which is and must necessarily remain relatively inactive because of that same over-capacity.

If there is any likelihood in such a situation that such resultant market price will not be a true competitive price,

it would appear to be, from the facts as found, because it will continue to be a price abnormally unfavorable to the sellers. This will be so because of the continued chronic absence of a reasonably balanced activity in competition among sellers on the one hand and buyers on the other, resulting from the ever present pressure of the over-capacity of the mines, the inherent need of the producer to keep producing and shipping, the pressure of economical substitutes, and the diminished demand due to improved methods of consumption.

For any accurate gauging of the economic and legal effect of any such plan as that of the defendants, it is therefore essential that those very circumstances of an industry which the Court below excluded from its consideration be looked at with care. In them are to be found the indicia of the actual functioning of the competitive system in an industry. In the light of that functioning must be determined any question as to whether a particular plan of concerted action has in it the prospective effect of oppression or whether it is merely a normal method of accomplishing legitimate business objectives. One of those objectives, where an industry is out of balance, is naturally to try to mitigate the oppressive effects of the resultant inequality and have a competitive unit strong enough and varied enough in its sources of supply to be able to lessen such practices as "distress" selling and "pyramiding" and their effect on the market and one which can compete more economically and effectively with its intra- and inter-industry competitors.

6. Concerted action among a group of competitors to create a new competitive unit by combining only their marketing function, while preserving their individual initiative in production, should certainly not be held *unlawful* in a case where concerted action among the same group of competitors to create a new competitive unit, which combines both their marketing and their producing functions through complete merger, would be held *lawful.*

The Court below has drawn a distinction between the rule to be applied in determining the legality of a combination of competitors by complete merger and a combination such as that here, where competitors have set up a common machinery for the marketing of their product but have retained full initiative and independence in development, production and financing.

As has been said, under the earlier development of the law there was some tendency to confuse the mere elimination of competition between two or more competitors, with which in itself the law has no concern, and the impairment of an effective competitive system in an industry, which is the vital concern of the law. But ever since the *Standard Oil* case[1] the test of legality of such a combination of competitors, both in practical administrative construction by the Department of Justice for the past twenty years and in such cases as have come before the courts, has been whether the creation of such a new unit would deprive the industry of an effectively functioning competitive system.

Wherein can there be any unreasonable restraint of trade or monopolization in the combination of precisely the same competitors in a manner which permits no greater unity of action in marketing than would be secured by

[1] *Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911).

merger, but which preserves the initiative in production and financial independence of each competitor? There is no inherent adverse difference in effect on price arising out of the mere form of combination. If the effect of the creation of the new unit is such that the price that can be obtained will no longer be determined by the play of effective competition, then either form of combination is illegal; but if that is not the effect, why should the combination be illegal in one form and not in the other?

The Court below uses the curious argument, as a basis for a distinction, that a merger is a tight and permanent form of combination which it is difficult to "unscramble," whereas a mere combination of the marketing function by competitors is a loose combination. It apparently argues that the tightness of the merger and the looseness of this form of concerted action is an important element of legality for one and of illegality for the other.

An instinct for the realities and for the practical administration of the law would seem to lead to a squarely contrary conclusion. In forecasting the probable results on the competitive system of a combination in either form, the Court may of course have a difficult and, in certain cases, a close question of fact to determine from its survey of the industry. It is always conceivable that the courts may misjudge the facts or that circumstances may change. In the case of a merger, if such a mistake has been made or if circumstances have changed so that its operations subsequently come to be regarded as illegal, it is difficult, although, as experience has shown, not impossible, to "unscramble" it. In the case of a combination merely for marketing purposes, however, if the Court fails correctly to gauge the prospective effect of the new unit, or if circum-

stances change, it can with the greatest ease effect a dissolution when the new facts are brought to its attention.

Arguments of economic advantage, of course, cannot affect the legality or illegality of the particular form of concerted action among competitors. But it is not too much to ask that the legal grounds be of the clearest before the use of this economic mechanism with its great potential possibilities of usefulness to the small concerns be foreclosed by condemning its use in circumstances where combination by merger would be approved. There are many arguments, both economic and social, against the integration of an industry into large units. There is a narrowing of the scope of private initiative which may well be socially undesirable; and, from the economic standpoint, the substitution of large scale corporate bureaucracy for the individual attention and initiative in production may well be inefficient. On the other hand, the small men in many industries, remote from markets and without a diversified product, are at a disadvantage in the marketing function which may well force them, but for the use of some such mechanism as this, into merger.

POINT IV.

There seems to be no controlling decision of this Court which stands in the way of the application of the principles for which we here contend.

We have found no decision of this Court inconsistent with the application of the principles here contended for. We shall refer, however, to the two cases which the Court below seemed to regard as most nearly in point.

(a) The Trenton Potteries Case.

In the *Trenton Potteries* case,[1] eighty-two percent of an industry combined to sell at an agreed price. This was a "take it or leave it" price,—a price which under the circumstances was not the resultant of competition between sellers to dispose of their product and between buyers to fill their requirements, but a price that, whether in itself reasonable or unreasonable, was imposed upon the buyers arbitrarily by the economic power of a combination of sellers. It was this power to substitute an arbitrarily "fixed" price for a price which was the resultant of dual active competitive forces that was the essence of the *Trenton Potteries* decision—

> "The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices."

It was held that the lawfulness of such a combination did not turn on the intrinsic reasonableness or unreasonableness of the price agreed upon.

But this arbitrary power, exerted through a combination embracing 82 percent of an industry, to fix prices charged by the industry is a very different thing from the mere offering of the supply of a particular group of competitors through a unified marketing entity, which the findings of fact and the opinion of the Court below disclose in the case at bar. That offering, it appears from those findings, will be subject to vigorous and effective competition with numerous other sellers in disposing of the practically unlimited supply, actual and potential, of coal and other

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[1] *United States* v. *Trenton Potteries Co., et al.*, 273 U. S. 392 (1927).

fuels that is available for market. There is no finding that indicates that any such offering by the new competitive unit would be made at any "take-it-or-leave-it" price. The terms of the contract seem to forbid it. In such a case, the price at which the product would actually change hands would be the final resultant of that competition between this unit and other sellers in disposing of their products and the competition among buyers in filling their requirements,—the latter inactive by reason of the effect of overcapacity. Such price might or might not correspond to the asking price—that would depend upon the play of the competitive forces in the market. It would not, if the findings of the Court below are correct, be a "fixed" price in any sinister sense of the word.

The only sense in which the sales unit, in view of the competitive conditions disclosed by the findings of fact, could be said to "fix" a price would seem to be that it could *name* the price of any particular lot of coal which it was *offering* competitively in the market. Any person offering any article for sale may be said to be able to "fix" the price in this sense. But the sense in which the term "fix" is used in the *Trenton Potteries* case and the only sense in which it can have any sinister significance in a Sherman Act case is not the *naming* of a price in the play of competitive bargaining, but the exercise of economic power adequate *to force upon the buyer the acceptance* of an *arbitrarily* named price.

The Court below has used the term "fix" in circumstances which only justify its use in its innocent meaning, but has then drawn a conclusion which could only have been justified if the term had been used in its quite different, sinister meaning.

Of course, if this Court should find from its own review of the evidence that the new unit will in fact exert "power to control the market and to fix arbitrary and unreasonable prices" in any substantial area, then the principles of the *Trenton Potteries* case apply. That is a question of fact which it is not our function to argue; but the decision of the *Trenton Potteries* case seems in no way inconsistent with the principles for which we are contending.

The *Trenton Potteries* case, as it came to this Court, involved a typical instance of an arbitrary destruction of the balanced operation of the competitive system by the creation of a combination with arbitrary power. There is nothing in the decision which forecloses a consideration of what protective measures may be taken where extrinsic causes have themselves unbalanced the competitive process and created that very inequality which the defendants in the *Trenton Potteries* case were producing by their artificial monopolistic combination. There is nothing in the case which justified the Court below in failing to gauge the prospective effect of the proposed action of the defendants in the light of the actual functioning of the competitive system in this industry.

(b) The Addyston Pipe Case.

The Court below, in drawing a distinction between the legality of the combination of a group of competitors into a single corporate entity and the legality of the combination of the marketing function of the same group of competitors, seems to have felt constrained to do so by the decision of this Court in the *Addyston Pipe* case.[1] The facts

[1] *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211 (1899).

just adverted to in the discussion of the *Trenton Potteries* case also afford immediate ground for distinguishing the *Addyston Pipe* case from the case at bar.

In the *Addyston* case, there was an area, and a substantial area, in which the group of competitors were able, by reason of advantage in freight rates, to fix and obtain arbitrary prices by a fraudulent system of fictitious bidding. This Court adopted and predicated its decision on the analysis of the facts made by the lower Court which established the monopolistic character of these prices. The fact that in other areas this group of competitors had no such power to impose an arbitrary price because of the active competition of other plants shipping into such areas of course did not relieve the combination of its illegality. On the other hand, the illegality of the joint activities of the group seems to be clearly rested on the destruction of competition by an exercise of arbitrary power in a substantial area.

Again, as in the *Trenton Potteries* case, there is nothing in the *Addyston Pipe* case to justify the Court below in failing to take into account the actual functioning of the competitive system in the coal industry in determining whether or not the proposed new competitive unit is an appropriate and lawful means of mitigating the oppressive results which flow to these defendants from the unbalanced condition of the industry.

(c) *Importance of Accurate Use of Terminology*

No branch of the law is more bedeviled than discussions under the Sherman Act by the use of expressions which have a vague and double meaning. Terms used in the opinions of this Court must not be torn from their factual con-

nection and then used argumentatively in different factual connections. We have spoken of the confusing double sense in which the term "fix" may be used. The Court below, in its opinion, also used the word "control" and the word "substantial", and indicated that the combination of a group of competitors which "control" a "substantial" part of interstate commerce is in itself illegal. The factual situation in the *Addyston* case illustrates the diverse and confusing ways in which these terms may be applied.

In the area in which the combination in the *Addyston* case was able to exercise an arbitrary power to fix price, it might be said that the group exercised a "control" (in the sense of an arbitrary power to fix price) over a "substantial" part of interstate commerce, and the illegality of such a combination of competitors would follow. On the other hand, in the other areas in which this group of competitors did business but did not possess this power, the same words might be used, but with a very different meaning and basis for legal effect. In such other areas it might also be said that the group of competitors exercised a "control" (in the sense of being the manufacturers and vendors) of a "substantial" part of interstate commerce (namely, that considerable part which they shipped into these markets). But here the basis for inference as to legality or illegality is an entirely different one from the situation in the monopolized area to which the same words used in another sense may be applied. Wherever such words, then, are used by a Court or in argument of counsel, it is necessary to stop, look and analyze, to see in which sense they can properly be used in the particular factual situation. Otherwise, there is always the danger of slipping into the logical fallacy which we feel is at the root of

what we regard as the error of the Court below. To put it into syllogistic form:

The first premise:

A combination of competitors which exercises power to fix (name and obtain) an arbitrary price in the disposal of a substantial amount of the product of an industry moving in interstate commerce is illegal (*Addyston Pipe* case). Such a combination may be described as a group having power to "control" a "substantial" part of interstate commerce.

The second premise:

Any group of competitors who produce and sell in interstate commerce a substantial amount of the product may also be described as having "control" of a "substantial" part of interstate commerce.

Conclusion:

Therefore (the decision below), concerted action in selling by any such group is illegal.

The Court below was apparently misled by its own use of words with more than one meaning. It lost sight of the fact that the vital factual element in the first premise was the power to exact an arbitrary instead of a normal competitive price, whereas that essential element was entirely lacking in its second premise and appears from the findings to be entirely lacking in the facts of the case.

Again the Court below in one of its findings states that the defendants will obtain prices higher than they would under "free competition". If by this is meant that the new competitive unit could and would enforce the acceptance of

an arbitrary price rather than one that is a normal resultant of the play of active competition among various sellers in disposing of their product and among buyers in filling their requirements, then the words have a sinister significance. But that, in view of its other findings, cannot properly be the sense in which the Court below uses these words. All it can properly mean in the light of those findings is that if these particular defendants do not create this stronger and more efficient competitive unit they will be less able to protect themselves from selling much of their product below cost and the other disadvantages to which they are subjected by the abnormal, practically monopolistic strength of the buyers' position due to chronic overcapacity and other causes. Has not the Court below misconceived the words "free competition"? *Is it not rather a restraint on "free competition" to forbid a group of those in this situation of inequality from forming a competitive unit strong enough to better resist oppression but with no power to oppress?*

(*d*) *Misapplication of "Rule of Reason" by the Court Below.*

It is true, as the Court below said, that the *Standard Oil*[1] and *Tobacco*[2] cases did not purport to overrule the previous decisions of this Court; but there has been no decision of this Court from the *Trans-Missouri* case[3] to the *Trenton Potteries* case, holding that a combination was illegal because it was "fixing" prices in which that combination did

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[1] *Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911).
[2] *United States* v. *American Tobacco Co.,* 221 U. S. 106 (1911).
[3] *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290 (1897).

not appear to have the power to fix an arbitrary price throughout the country generally, or in a substantial area. On the other hand, certainly since the *Standard Oil* and *Tobacco* cases, it has been the rule that the mere elimination of competition between particular competitors in one or in all respects has not been held to be in and of itself illegal.

The general clarification of the law that has been made in the *Standard Oil, Tobacco, Steel,*[4] *Harvester,*[5] *Maple Flooring* and *Cement* cases, and in the *Trenton Potteries* case itself, should suffice to negative such an unreasonable result as to hold lawful the complete elimination of competition among a group of competitors by merger, but unlawful the elimination of competition among the same group in only one function, such as marketing. It is the existence of an effective competitive system in the industry with which the law is concerned. The Court below recognized that the "Rule of Reason" was not to be entirely ignored in this class of case, conceding that a very small group of competitors might operate through a single sales agent. When, however, the Court below ruled that such a plan becomes unlawful simply becaus the group is larger and together does a substantial part of the business of the industry, although the integration of such a group into a single competitive entity would not have been unlawful, and although it is without power to interfere with the development of market price through the operation of an effective competitive system in the industry, then it seems to us that the light of reason as applied by the Court below flickered and went out.

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[4] *United States* v. *U. S. Steel Corp.*, 251 U. S. 417 (1920).
[5] *United States* v. *International Harvester Co.*, 274 U. S. 693 (1927).

POINT V.

The court in applying this statute to changing conditions as they arise is in effect developing a branch of the common law.

In framing the Sherman Act Congress made an important choice. It could have framed a regulatory statute which would have been specific in its terms, dealing specifically with the various courses of conduct that might affect the competitive system and providing specifically what might or might not be done in a wide range of varying circumstances. Instead of that, with admirable judgment and great conciseness, it in effect made the common law as to restraint of trade and monopolization in private industry applicable to interstate commerce and turned that law over to be developed by this Court like any other branch of the common law, as a living organism. *Nash* v. *United States*, 229 U. S. 373 (1913); *Standard Oil Co.* v. *United States*, *supra.*

Instead of a static body of law, we have, then, a growing body of law, capable of adapting itself to the changing industrial organism to which it is to be applied. Its objective is entirely clear. It is the maintenance of an effectively functioning competitive system. As a result of experience it is now clear that, within a wide scope, concerted action among individual competitors may not only be consistent with that objective, but actually promotive of that objective, and that the desideratum is the greatest freedom in such development that is consistent with the effective functioning of the competitive process. That is the practical business problem which confronts industry today; it is the practical

legal problem under the anti-trust laws which confronts the courts today. It raises and will raise questions of fact, often involving, as here, the survey of a wide range of business facts, but they are no more difficult than other questions constantly arising in other fields of the common law through the growing complexity of modern life.

Since Congress did not choose to place either the courts or industry in a Procrustean bed of rigid and minute rules and specifications, there is room for development and adaptation of the competitive mechanism. If the effects of a given form of concerted action by competitors cannot be satisfactorily forecast, an injunction can for the time being be denied with leave to renew on the showing of further facts. Observation of the way a given mechanism works can and should be availed of where the alternative is to foreclose development because of mere speculative fears.

Industry has, perhaps, been unduly deterred from exploring the possibilities of mitigating the inefficiencies and breakdowns of the competitive system by the loose assumption that has sometimes been made that *any* concerted action among competitors or any group of competitors to that end is illegal. The defendants in this case have performed a public service. Fully accepting the competitive system, they have made a deliberate study of its workings in their industry and formulated this plan as promotive of its sound functioning.

This Court in the *Tobacco* and *Standard Oil* cases made a reanalysis of the objects and scope of the anti-trust laws which had a profound effect on industrial development in affording a reasonable test for the legality or illegality of the combination of a group of competitors into a single entity. We suggest that the time has come, and this case

may well furnish the occasion for, a reanalysis of the functioning of the competitive system. Such a reanalysis would involve a consideration of the legal bearing of important present characteristics of that system upon the efforts of a group of competitors to deal with the inefficiencies of the system and to mitigate the oppressive consequences which flow from a breakdown of its protective functioning. This is a vitally important matter to small units which feel their individual weakness yet wish to retain their individuality.

It would be enormously helpful, in dealing with the problems with which competitive industry is now faced, if there were a recognition that action among groups of competitors within the frame of the competitive system may be promotive of the objective of its maintenance and corrective of the devastating effects of its breakdowns, and that it is in accord with the statute that the helpful possibilities of such action be worked out.

As for the particular plan before this Court, we ask this Court to scrutinize with the utmost care the validity of the grounds advanced for foreclosing a group of members of a distressed industry from trying out an economic mechanism, the use of which promises to be in the public interest.

Respectfully submitted,

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December 30, 1932.